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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER JON MARTINEZ, Defendant and Appellant.	B198173 (Los Angeles County Super. Ct. No. MA029691)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles A. Chung, Judge. Affirmed.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Beverly K. Falk, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Christopher Jon Martinez, appeals the judgment entered following his conviction, by jury trial, for second degree murder, gross vehicular manslaughter while intoxicated, driving under the influence of alcohol and causing injury, and driving with .08 percent blood alcohol level and causing injury, with enhancements for causing great bodily injury and death. (Pen. Code, §§ 187, 191.5, 12022.7; Veh. Code, §§ 23153, subds. (a) & (b); 23558.) Martinez was sentenced to state prison for a term of 15 years to life.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), we find the evidence established the following.

1. *Prosecution evidence*.

In August 2004, the intersection of 40th Street West and Avenue K in Lancaster was controlled by overhead electronic traffic signals. Avenue K, which ran east/west, had three lanes in the westbound direction. The middle lane ran straight through the intersection, the left lane was a left-turn-only lane, and the right lane was a right-turn-only lane. The posted speed limit at the intersection for both east/west and north/south traffic was 55 miles per hour. The traffic signals at the intersection had not been programmed with a safety interval between traffic-direction changes. That is, the light controlling the north/south traffic on 40th Street would turn green at the same moment the light controlling the east/west traffic on Avenue K turned red, and vice versa.

On the morning of August 25, 2004, Arlo Johnson and Catherine White were riding in defendant Martinez's Toyota 4-Runner. Johnson was in the front, White was in the back, and Martinez was driving.

Joy Thomashow, a bus driver for the Antelope Valley Transit Authority, was driving westbound in the middle lane on Avenue K and approaching 40th Street. When she was still about 80 feet from the intersection, the light turned yellow so she began to slow down. Looking in her mirror, she saw Martinez coming up behind her and not slowing down. Thomashow testified she was fully stopped at the intersection when

Martinez passed her on the right going very fast and entered the intersection. Thomashow testified the light on Avenue K was red when Martinez entered the intersection.

Anthony Borquez, driving eastbound on Avenue K and approaching 40th Street, began to slow down for the yellow light. He saw Martinez coming westbound toward the intersection at a speed Borquez estimated to be more than 65 miles per hour. Martinez moved into the right-hand lane and seemed to be trying to beat the light. Borquez testified the light was red when Martinez entered the intersection, and that he exclaimed to his passenger, "Oh, my God. He is running the light."

Meanwhile, Vanessa Ashford Wiley was driving a Dodge Caravan minivan southbound on 40th Street. When Wiley entered the 40th Street/Avenue K intersection, her car was struck by Martinez's 4-Runner. Borquez testified "the 4-Runner actually flipped over the Caravan and it just flipped through the air." Following the collision, the 4-Runner was resting on its passenger side and the Caravan was upside down. Wiley was lying a few feet from her vehicle. She was pronounced dead at the scene.

Los Angeles County Deputy Sheriff John White responded to the crash scene. There were no unusual roadway conditions and the traffic signals were functioning properly. White concluded Martinez had failed to stop for a red light and then broadsided Wiley.

Los Angeles County Deputy Sheriff Dennis Campbell found five cans of beer in and around the 4-Runner. One of the cans was cold to the touch and its pull tab was open. The other cans did not appear to have been opened. Campbell later obtained a copy of a videotape taken by a surveillance camera on Thomashow's bus. The videotape showed the 4-Runner passing the bus.

Los Angeles County Deputy Sheriff Richard Dailey conducted a speed analysis of the collision. He concluded that, at the point of impact, the 4-Runner had been traveling about 61 miles per hour and the Caravan about 43 miles per hour.

Los Angeles County Deputy Sheriff Michael Rodi spoke to Martinez in the emergency room at Antelope Valley Hospital. Martinez asked him, "Did I kill my friends in the accident?" When Rodi said all he knew was that they had been evacuated by helicopter, Martinez replied, "I'm done, dude. I killed people and there is alcohol in me. I have two D.U.I.'s on my record." Martinez said he had been partying at his son's birthday until going to bed at 3:00 a.m., but that he had gotten up at 6:00 a.m. to take his friends home. Rodi could smell alcohol coming from Martinez's "breath and body."

Los Angeles County Deputy Sheriff Douglass McCullough also spoke to Martinez in the emergency room. McCullough testified: "There was the smell of alcohol coming from him. He had bloodshot, watery eyes, and his speech was slurred." Martinez said he had been drinking "beer and Tequila shots" until 2:00 a.m. He described "traveling westbound on Avenue K, approaching 40th Street West," and encountering "a slower moving vehicle in front of him. He noticed the light at the intersection had changed yellow, and the vehicle in front of him suddenly slowed. He swerved around the vehicle to avoid [a] collision and entered the intersection and collided with a southbound vehicle."

Martinez had committed the following prior offenses: driving under the influence of alcohol (1989); driving under the influence of alcohol (1990); driving with a .08 percent or more blood alcohol level (April 1999); and, driving under the influence of alcohol (August 1999). Martinez was still on probation for this last case when the instant offense occurred.

2. *Defense evidence*.

Mortimer Moore, a forensic physicist, estimated that at the point of impact Martinez had been going between 59.3 and 62.4 miles per hour, while Wiley had been going between 43.5 and 45.0 miles per hour. Because a surveillance camera showed that "traffic was exceedingly light," Moore opined Martinez had not been "violating the basic

speed law" which "says that the proper speed is the one that is correct for the conditions."[1]

Moore also testified the bus surveillance tape contradicted Thomashow's account, that Martinez was still behind her when the light turned red, because the tape showed Martinez in front of the bus while the light was still yellow. Moore opined Martinez had entered the intersection at the tail end of the yellow light, before Wiley entered the intersection, and that Wiley had not stopped before entering the intersection.

According to the defense theory, Wiley had "timed" her entry into the intersection to avoid slowing down and she then drove into the intersection just as the light turned green for her. This, argued the defense, constituted the proximate cause of the accident because Martinez was already in the intersection.

Harold Karaka, a retired police officer, viewed the accident scene and testified that, from where Borquez was situated, he would not have been able to see if an oncoming car had entered the intersection.

CONTENTIONS

1. The trial court failed properly to instruct the jury on the issue of causation.
2. Martinez was improperly convicted of necessarily lesser included offenses.

DISCUSSION

1. *Trial court gave proper causation instructions.*

Martinez contends his convictions must be reversed because the trial court misinstructed the jury on the issue of causation. He makes two interrelated claims: the trial court misinstructed on proximate cause, and erred by not instructing, sua sponte, on the concept of superseding cause. These claims are meritless.

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[1] Vehicle Code section 22351 subdivision (b) provides: "The speed of any vehicle upon a highway in excess of the prima facie speed limits in Section 22352 or established as authorized in this code is prima facie unlawful unless the defendant establishes by competent evidence that the speed in excess of said limits did not constitute a violation of the basic speed law at the time, place and under the conditions then existing."

Proximate cause in criminal cases is determined by ordinary principles of causation (*People v. Armitage* (1987) 194 Cal.App.3d 405, 420) and is a question of fact for the jury (*People v. Harris* (1975) 52 Cal.App.3d 419, 427). "Thus, in homicide cases, a 'cause of the [death of the decedent] is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the [death] and without which the [death] would not occur.' " (*People v. Schmies* (1996) 44 Cal.App.4th 38, 48.)

In his opening brief, Martinez complains that when the trial court gave its general instruction on causation it "failed to recite the heart of CALJIC No. 3.40: 'The criminal law has its own particular way of defining cause. A cause of the death is an act that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act, the death and without which the death would not occur.' [¶] That is an unfortunate elision, because the 'direct, natural, and probable consequences' formulation not only delimits proximate cause, but also expresses the requisite element of foreseeability." As authority for this assertion, Martinez cites *People v. Nguyen* (1993) 21 Cal.App.4th 518, 535.

But *Nguyen* was not discussing proximate cause; it was discussing the natural and probable consequences doctrine, which is an alternative mens rea element of accomplice liability. (See *People v. Nguyen, supra,* 21 Cal.App.4th at p. 534 ["an aider and abettor 'need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator' but is responsible for any reasonably foreseeable consequence of the criminal conduct he intentionally encouraged or facilitated"].) Moreover, in connection with its definition of criminal negligence, the trial court instructed the jury as follows: "The facts must be such that the consequences of the negligent acts could reasonably have been foreseen and it must appear the death was not the result of inattention, mistaken judgment or misadventure but the natural and probable result of an aggravated, reckless or flagrantly negligent act." As the Attorney General

points out, this language is very similar to the language Martinez claims was missing from the causation instruction.[2]

In his reply brief, Martinez shifts direction, complaining the language cited by the Attorney General "does not ask the question of whether 'the chain of events' leading to death – a chain that necessarily includes *the conduct of the victim* – was, in fact, a 'direct, natural, and probable consequence' of defendant's unlawful act. The latter is a more stringent formulation of causation that allows for the doctrine of superseding cause."

But Martinez fails to cite any case authority holding that the phrase "chain of events" must be included in every proximate cause instruction, nor have we been able to find any. And, in the circumstances of this case, we cannot see there is any substantive difference between "chain of events" and "consequences." This is not a situation like *People v. Roberts* (1992) 2 Cal.4th 271, which involved a true chain of events. In *Roberts*, the defendant stabbed a fellow prison inmate who, before he died, pursued the defendant's accomplice and fatally stabbed a guard. The chain of events question concerned the defendant's liability for the death of the guard.[3] Here, on the other hand, the only actors were Martinez and Wiley, and the only act was Martinez driving into the intersection and colliding with Wiley.

Martinez's second claim, that the trial court erred by not giving a superseding cause instruction, is equally meritless. " 'In general, an "independent" intervening cause will absolve a defendant of criminal liability. [Citation.] However, in order to be

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[2] "[T]he correctness of an instruction is to be determined in its relation to other instructions and in light of the instructions as a whole." (*People v. Johnson* (1980) 104 Cal.App.3d 598, 613; see also *People v. Hardy* (1992) 2 Cal.4th 86, 187 [although two instructions were technically inconsistent, "error [found] harmless after considering the instructions as a whole"].)

[3] *People v. Schmies, supra,* 44 Cal.App.4th 38, is similar to *Roberts* because there the defendant had "fled from an attempted traffic stop and engaged in a high-speed vehicle chase with peace officers. During the chase, one of the pursuing patrol cars struck another car. The driver of the other car was killed . . . ." (*Id.* at p. 43.)

"independent" the intervening cause must be "unforeseeable . . . an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause." [Citation.] . . . "A defendant may be criminally liable for a result directly caused by his act even if there is another contributing cause. If an intervening cause is a normal and reasonably foreseeable result of defendant's original act the intervening act is 'dependent' and not a superseding cause, and will not relieve defendant of liability. [Citation.] '[ ] The consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. [ ] The precise consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind which might result from his act.' [Citations.]" [Citations.]' " (*People v. Cervantes* (2001) 26 Cal.4th 860, 871.)

Martinez argues that "Wiley's own conduct leading up to the accident was not reasonably foreseeable, constituting a supervening cause and thereby breaking the causal chain required for liability." Martinez asserts there was evidence showing "not only that [he] entered the intersection before Wiley did, but also that he did so *legally*, on a yellow, at six or seven miles over the speed limit. Wiley, however, was intentionally timing the light . . . to enter the intersection at relatively high speed an instant after green. That intentional act was also an illegal one, because the intersection was occupied by appellant's car – and legally occupied, to boot. (Veh. Code, § 21451, subd. (a) [illegal to enter an occupied intersection].) . . . Such grossly negligent and intentional misconduct was not foreseeable, constituting a superseding cause that precludes appellant's liability under the law."

But Martinez is ignoring the undisputed evidence he entered the intersection from the right-turn-only lane, i.e., that even if he had entered the intersection on a yellow light and even if he had not been speeding, his presence in the intersection was illegal. Contrary to Martinez's assertion, Vehicle Code section 21451, subdivision (a), did not render Wiley's conduct illegal and, therefore, unforeseeable, because that statute only requires yielding the right-of-way to "other traffic . . . *lawfully* within the intersection . . . ." (Italics added.)

It was undisputed the bus came to a stop in the only lane from which travel into the intersection was permitted. In that situation, it was a reasonably foreseeable possibility that Wiley might deem it safe to enter the intersection as soon as her light turned green, and thus her conduct could not have been a superseding cause. (See *People v. Cervantes, supra,* 26 Cal.4th. at p. 871.)

We conclude the trial court's causation instructions were not erroneous.

2. *Lesser included offenses.*

Martinez contends his convictions on count 3 (Veh. Code, § 23153, subd. (a) [DUI causing injury]) and count 4 (Veh. Code, § 23153, subd. (b) [driving with .08% blood alcohol causing injury]) must be reversed because these crimes are lesser included offenses of gross vehicular manslaughter (Pen. Code, § 191.5), for which he was also convicted. This claim is meritless.

Martinez predicates his claim on two cases, *People v. Miranda* (1994) 21 Cal.App.4th 1464, and *People v. Binkerd* (2007) 155 Cal.App.4th 1143. But, as the Attorney General correctly points out, in those cases the defendant had been charged with injuring (under the Vehicle Code) and killing (under the Penal Code) the same victim. Here, the alleged victim in the vehicular manslaughter count was Wiley, whereas the victims named in the felony drunk driving counts included Johnson and White, the passengers in Martinez's car. Hence, Martinez was not convicted for lesser included offenses. (Cf. *People v. McFarland* (1989) 47 Cal.3d 798, 803 ["separate punishment is permissible where a defendant, in a single incident, commits vehicular manslaughter as to one victim . . . and drunk driving resulting in injury to a separate victim"].)

Martinez was not convicted on lesser included offenses.

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.